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ABDUL HAMID MOHD AMIN v. RAMACON CORPORATION SDN BHD

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[CIVIL APPEAL NO: 12B NCVC-12-03-2015]
B 4 DECEMBER 2015

CIVIL PROCEDURE: *Time – Extension of – Delay in filing and serving appeal record – Whether breach of mandatory provisions – Whether curable – Whether sufficient grounds advanced for exercise of court's discretionary power – Rules of*
C *Court 2012, O. 1A , O. 3 r. 5(1), O. 55 r. 4(1)*

WORDS & PHRASES: *'shall' – Word in procedural rules – Whether mandatory provision – Rules of Court 2012, O. 55 r. 4(1)*

The appellant, *vide* the notice of application ('encl. 6'), was seeking an
D extension of time pursuant to O. 3 r. 5(1) of the Rules of Court 2012 ('ROC') and the inherent jurisdiction of the court under O. 92 r. 4 of the ROC to file and serve the appeal record ('AR') out of the time prescribed under O. 55 r. 4(1) of the ROC. The appellant further sought that the AR, which was filed in court on 9 April 2015 and served on the respondent's solicitors on the
E same day, be deemed proper filing and effective service respectively. The grounds advanced by the appellant in support of his application were, *inter alia*: (i) the appellant did not intend to file the AR out of time; (ii) the respondent would not be prejudiced by the delay of 11 days and even if there was any element of prejudice, it could be adequately compensated in costs;
F and (iii) the unintentional delay was due to the reason that the appellant was awaiting the completion of the notes of evidence and grounds of judgment from the trial court and there was no response on the draft index served on the respondent's solicitors.

Held (dismissing encl. 6 with costs):

G **(1)** Non-compliance of a mandatory provision of the ROC which is fundamental in nature will no longer be regarded as technical non-compliance of a rule that may be remedied under O. 1A of the RHC. Where there are blatant breaches of rules and procedure that are mandatory and fundamental in nature, the applicant needs to show
H strong and cogent grounds that are considered sufficient in order to invoke the court's discretionary power to grant extension of time. (paras 6 & 7)

(2) The word 'shall' in procedural rules is mandatory provision that cannot be casually disregarded but must be strictly complied with and adhered
I to, save under exceptional circumstances. The appellant had admittedly failed to file his AR within the expressly stipulated 30 days deadline but

had only done so 41 days after filing and service of the notice of appeal. He had thus breached the mandatory provisions of O. 55 r. 4(1) of the ROC. (paras 12 & 13)

(3) Although the delay was mere 11 days, the grounds advanced by the appellant for the delay were far from strong and cogent for the court to justifiably exercise its discretion in favour of an extension. The ground, that the delay was due to an oversight of the time limit of 30 days to file the AR while awaiting for the notes of evidence and grounds of judgment to be supplied by the trial court, lacked credibility in view of the fact that the appellant was then represented by solicitors. The lack of *bona fide* on the part of the appellant was manifestly clear from his filing of application for extension of time only after the respondent had filed its striking out application. Further, the appellant's allegation that the failure of the respondent's solicitors to respond to the draft index had contributed to the delay in the filing of the AR, was shown to be patently baseless and misconceived. When the appellant's solicitors sent the draft index to the respondent's solicitors, the appellant was already out of time to file the AR. (paras 13, 14, 15 & 18)

(4) Although the court is vested with wide discretionary powers in deciding whether an application for extension of time should be granted, the discretionary powers must be exercised judicially in accordance with the established principles and by taking into account all relevant consideration. In this case, there was blatant disregard for and disobedience of the relevant rules for which there was no sufficient material to justify the exercise of the court's discretion to cure the non-compliance. (paras 16 & 18)

Case(s) referred to:

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Ibrahim Dahaban & Ors v. Mohd Daud Mohd Yusof & Anor [2000] 5 CLJ 600 HC ***(refd)***

Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 HC ***(refd)***

R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897 ***(refd)***

Scott & English (M) Sdn Bhd v. Leikie Registration & Stainless Steel Industries Sdn Bhd & 2 Ors [1994] 3 CLJ 114 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 3 r. 5(1), O. 55 r. 4(1), O. 92 r. 4

Rules of the High Court 1980, O. 1A

A *For the appellant - S Ashok; M/s Leela A Sanghrajka & Assocs*
For the respondent - Dinesh Nandrajog (Pradeep Kumar Nandrajog & Henna Nandrajog with him); M/s Syarikat KL Rekhraj

Reported by S Barathi

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JUDGMENT

Gunalan Muniandy JC:

[1] This application arises out of an appeal against the decision of the Sessions Court in a civil suit for a debt due for services rendered by the C appellant/plaintiff to the respondent/defendant.

[2] The appellant *vide* this notice of application is seeking an extension of time pursuant to O. 3 r. 5(1) of the Rules of Court 2012 ('ROC') and the inherent jurisdiction of the Court under O. 92 r. 4, ROC to file and serve the appeal record ('AR') out of the prescribed time under O. 55 r. 4(1), ROC and D the inherent jurisdiction of the Court under O. 92 r. 4, ROC. Further, that the AR which was filed in Court on 9 April 2015 and served on the same day on the respondent's solicitors be deemed as proper filing and effective service respectively.

E **[3] Grounds Of Application (encl. 6)**

(i) at all material times the appellant did not have the intention of filing the AR out of time.

(ii) the respondent will not be prejudiced by a delay of only 11 days and even if there is any element of prejudice, they can be adequately F compensated in costs.

(iii) this appeal by the appellant has merits.

(iv) the unintentional delay of 11 days is for these reasons:

G (a) Awaiting completion of the notes of evidence and grounds of judgment.

(b) The draft index served on the respondent's solicitors did not receive any response. The AR filed on 9 April 2015 was without their approval.

H **Grounds For Opposing Application**

[4] The respondent objected to this application briefly on these grounds:

(i) the appellant's non-compliance with O. 55 r. 4, ROC is serious and not curable under any circumstances.

I (ii) the reason given by the appellant for the delay in filing the AR which is merely oversight as to the 30 day period under O. 55 r. 4, ROC is unreasonable, especially as the appellant was represented by solicitors at that time.

(iii) this application for abridgment of time was filed by the appellant only after the respondent had filed an application to strike out the notice of appeal and AR. Hence, the appellant's conduct was *mala fide* and a failure to take seriously procedural rules of court.

(iv) at the time when the draft index was served on the respondent on 3 April 2015 the time provided for filing of the AR had lapsed and therefore, it was clear that the appellant had raised a baseless ground for the late filing that should not be considered by the court.

The Law Applicable

[5] Order 55 r. 4(1), ROC contains mandatory provisions for the filing of a record of appeal as follows:

> (1) In the case of an appeal from a decision after trial, the appellant shall within one month from the date of filing of notice of appeal prepare and file the requisite number of copies of the record of appeal and the record shall contain copies of:
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> ...
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> Provided that the record of appeal shall be filed notwithstanding that the notes of evidence and/or grounds of judgment are not ready or that the sealed decision, order or judgment has not been extracted.
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> (2) In the event the notes of evidence and/or grounds of judgment are not ready or the sealed decision, order or judgment has not been extracted within the period specified in rule 4(1) above, then the notes of evidence and/or grounds of judgment, where they are made available and a copy of the sealed decision, order or judgment when extracted, shall be filed by way of a supplementary record of appeal without leave of the High Court.

[6] It is now settled law that non-compliance of a mandatory provision of the ROC which is fundamental in nature will not be regarded as technical non-compliance of a rule that may be remedied under O. 1A of the RHC. This issue was dealt with by the Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 where Tun Zaki Azmi, CJ held:

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. O. 1A RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O. 1A RHC does not apply as the respondents had intentionally disregarded O. 6 r. 7(2A) RHC for their own reasons.

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> [48] In the context of the Rules of the High Court 1980 the phrase "... technical non-compliance ..." is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.

B **[7]** Where there are blatant breaches of rules and procedure, particularly those that are mandatory and fundamental in nature, the applicant needs to show strong and cogent grounds that are considered sufficient in order to invoke the court's discretionary powers to grant an extension of time. As succinctly pronounced by KN Segara J (as he then was) in *Ibrahim Dahaban & Ors v. Mohd Daud Mohd Yusof & Anor* [2000] 5 CLJ 600:

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> [2] The granting or dismissal of an application for extension of time is very much a discretionary matter. Full and frank disclosure must be made in the affidavit in support. This was not so in this case. Nevertheless, counsel should be commended for being brave, honest and responsible in admitting her mistake from the Bar. However, a solicitor's mistake and
D omission to be vigilant cannot be accepted as an explanation and ground to grant an extension of time. The principle to be gleaned from several Federal Court decisions is that the mistake of a solicitor or the solicitor's clerk is not a sufficient ground to grant an extension of time.
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> [3] Rules of court must *prima facie* be obeyed. There was no material
E placed before the court which justified the exercise of the court's discretion in favour of the appellants to grant an extension of time to file the record of appeal.

[8] An application for extension of time may be made even after the expiration of the relevant period stated in the Rules. In *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [1998] 4 CLJ 883; [1998] 4 MLJ 297
F the Court of Appeal held:

> Under O. 3 r. 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry of the period. The primary consideration in exercising discretion to extend time is whether the party
G can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

[9] On the inherent jurisdiction vested in the court, it was held in *R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 All ER 897:
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> The country court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend any time limits ... The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed.

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Finding

[10] It would be useful at the outset to set out the chronology of events that culminated in the instant application being made which is briefly stated in the respondent's submissions as follows:

1. 04.03.2014	-	Appellant filed his Writ of Summons and Statement of Claim against the Respondent at the Shah Alam Sessions Court.
2. 3.04.2014	-	Respondent filed its Statement of Defence & Counterclaim against the Appellant.
3. 13.10.2014 & 14.10.2014	-	Full Trial.
4. 18.02.2015	-	The Learned Sessions Court Judge delivers her decision. She dismisses the Appellant's claim and allows the Respondent's counterclaim in part.
5. 06.04.2015	-	Dissatisfied with the decision of the Learned Sessions Court Judge, the Appellant filed its Notice of Appeal.
6. 09.04.2015	-	Appellant filed its Record of Appeal.

[11] The claim filed by the plaintiff/appellant was for an alleged balance sum owed by the defendant/respondent to the former for his services in procuring a sub-contract whilst the latter counter-claimed against the appellant claiming that they had overpaid him for the services rendered considering that he had discharged himself as a consultant to the respondent.

[12] It is a well settled proposition that 'shall' provisions in procedural rules are mandatory provisions that cannot be casually disregarded but must be strictly complied with and adhered to save under exceptional circumstances. The courts have consistently upheld and reiterated this principle. As correctly remarked by Nik Hashim, J (as he then was) in *Mat Yassin Dollah v. Ibrahim Hussin & Anor* [1996] 4 CLJ 395:

> [5] Order 49 r. 3A(1) of the SCR is mandatory in its terms by reason of the word 'shall' contained therein. Accordingly, strict compliance with the provisions of O. 49 r. 3A(1) of the SCR is required; a failure to enclose any one if the necessary items in the appeal record will render it defective. The rules of the Court must be obeyed; they must be me obeyed; they must be meticulously and faithfully complied with.

[13] In the instant case, the appellant had admittedly failed to file his AR within the expressly stipulated 30 day deadline but had only done so 41 days after filing and service of the notice of appeal. This was undoubtedly in breach of the mandatory provisions of O. 55 r. 4 (1), ROC for which a reasonable and credible explanation is called for in order for the appellant to move the court to exercise its discretion to allow an abridgement of time and cure the said breach.

[14] The appellant, while admitting that he was out of time in filing his AR has merely proffered a single reason for this failure or neglect, namely, that it was due to an oversight of the 30 day time limit for filing of the AR while awaiting the notes of evidence and grounds of judgment to be supplied by the trial court. The question arose as to whether this sole ground would constitute a reasonable and justifiable basis for the court to grant an extension of time despite the clear breach of a mandatory requirement under the ROC that called for strict compliance. As rightly contended by the respondent, the appellant was then represented by solicitors, who should have been well aware of the relevant provisions of the ROC. Hence, the reason given for non-compliance premised on oversight wholly lacked credibility and was, instead, under the circumstances, a patently lame excuse that did not merit serious consideration.

[15] Furthermore, the lack of *bona fide* on the part of the appellant is manifestly clear as he had only filed this application seeking an order to extend time after the respondent had filed its striking out application by invoking the inherent jurisdiction of this court. The appellant's failure or neglect to do so promptly and immediately following the filing of the AR out of time indicated no less than a clear disregard for mandatory provisions of O. 55 r. 4(1), ROC as alluded to.

[16] Similarly, the appellant's allegation that the failure of the respondent's solicitors to respond to the draft index ('DI') of the appeal record sent by his solicitors on 3 April 2015 had contributed to the delay in the filing of the AR was shown to be patently baseless and misconceived. When the appellant's solicitors sent the DI to the respondent's solicitors on 3 April 2005, the appellant was already out of time to file the AR as the prescribed period for filing had already expired on 29 March 2015. This further negated and invalidated the reasons for the delay proffered by the appellant in support of his application for extension.

Conclusion

[17] It has to be reiterated that the court is vested with wide discretionary powers in deciding whether an application for extension of time should be granted or dismissed. On principle and authority, any exercise of discretionary powers must be done judicially in accordance with established principles and by taking into account all relevant considerations. In the exercise of the court's discretion whether to grant or refuse an extension of time it is accepted that the court should basically consider the following relevant factors:

(i) the length of the delay;

(ii) the reasons of the delay;

(iii) the merits of the appeal; and

(iv) the degree of prejudice to the respondent.

(See *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 6 MLJ 134).

[18] These factors are, however, meant to only serve as a guide and not intended to be rigid, mandatory conditions in the exercise of the court's discretion.

(See *Scott & English (M) Sdn Bhd v. Leikie Registration & Stainless Steel Industries Sdn Bhd & 2 Ors* [1994] 3 CLJ 114*;* [1994] 2 MLJ 424).

[19] On the foregoing grounds as elaborated, I found that, although the delay was a mere 11 days, the grounds in support advanced by the appellant were far from strong and cogent for the court to justifiably exercise its discretion in favour of an extension but instead lacked *bona fides* and credibility as well. A solicitor's mistake and omission or oversight as claimed as to the prescribed deadline to file the AR by itself cannot afford a plausible explanation for the non-compliance and sufficient ground warranting the grant of an extension of time based on settled principles. In essence there was blatant disregard for and disobedience of the relevant rules for which there was no sufficient material at all to justify the exercise the court's discretion in favour of acceding to the appellant's application to cure the non-compliance *via* an extension of time. I, therefore, dismissed encl. 6 with costs of RM2,000 to the respondent.